

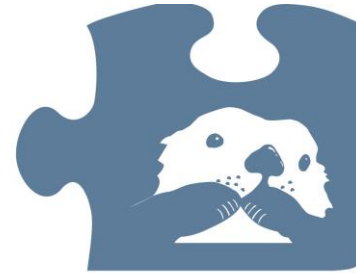
Legal Comments on Revised Second Draft Waste Discharge Requirements General Order No. R5-2012-0116

February 7th, 2018
Stanford Mills Legal Clinic



CRLA

*CRLA on behalf of Petitioners
Planada en Accion and Fairmead Community*



The Otter Project

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Precedential Regulations of Concern as of Change Sheet #1, 2/2/18

Vague “precedential direction” of this Order overall.

Specific concerns:

- Lack of a specific limit on nitrogen presence in soil/groundwater
 - How will A/R ratios and parameters be calculated?
 - Lack of guidance in developing A/R coefficients.
 - Use of “outlier” status in identifying problematic growers, which bolsters the lack of objective standards.
- Monitoring and reporting
 - Use of third parties to manage specific growers’ practices.
 - Grower-specific field level management practice data anonymity
 - Field-level AR data submission anonymity
- Categorical exemption of certain growers from nitrogen reporting requirements
- INMP Reporting
- Surface water monitoring
- Toxicity

We are also concerned as to the Order’s effectiveness at managing nitrogen and pesticide pollution in East San Joaquin (e.g. surface water monitoring to be determined by an expert panel to be convened in the next 18 months).

Underground Regulations

“Regulation’ means every rule, regulation, order or standard of general application . . . to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.” **Gov. Code § 11342.600**; see also *Tidewater Marine Western v. Bradshaw* (describing two-prong requirement for determining whether a policy qualifies as a regulation)

- The precedential nature of the complex quality control standards and monitoring programs in the State Board’s proposed order and its revisions of the Central Valley WDR constitute underground regulations.
- “[A]utomatic application of all requirements endorsed in this order to all of the agricultural discharge programs statewide is inappropriate.” **Footnote 15, Revised Second Draft Order, at 9.**
 - The Revised Second Draft Order makes precedential a series of management and reporting obligations
 - Each constitutes a regulation of which regions outside the Central Valley have not received adequate notice
- The Board does not index this Order as a precedent decision, as has been its practice in the past. Promulgation of these regulations, however, is still governed by the APA and must be put through the rulemaking process.

Procedural Due Process: Expert Comments

- The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.
 - “No State shall ... deprive any person of life, liberty, or property, without due process of law.” **United States Constitution, amend. XIV.**
 - “A person may not be deprived of life, liberty, or property without due process of law ...” **California Constitution Art. I. § 7(a).**
- 2/2/18 3:55 PM decision to include expert comment. **Footnote 10, Revised Second Draft Order, Change Sheet #1 at 6.**
 - “Comments on Surface Water Monitoring Requirements in the Eastern San Joaquin Region’s Agricultural Areas and Monitoring Design Recommendations” by Revital Katznelson Ph.D. Authored 12/20/2017. Submitted 12/22/2017.
- State Board must adequately consider comments.

Procedural Due Process: Administrative Record

- The Board took the Order on its own motion. **Revised Second Draft Order at 6.**
 - Petitions should not limit issues
- “Subsequent to the filing of the petitions, several interested persons raised new issues that were not directly related to revisions to the General WDRs contained in this order. These issues were not timely raised and have not been addressed in this order.” **Footnote 17, Revised Section Draft Order at 9.**
 - Does not specify what those issues are or who raised them
 - Provides no guidance about what the Board considers “timely” or what issues the public may still comment on
- Only addressing issues raised in the original petitions= impossible burden on the public.
 - Petitioners must have anticipated revisions to in 2014: three years before the revisions were made
 - In 2014 the State Board had not yet determined that this Order would be precedential. This determination raised new issues that petitioners could not have addressed in their initial petitions.
 - Board does not identify which issues in petitions they will address - no exhaustive list provided
- Undermines the fundamental purpose of the notice & comment period for WDR’s. **Water Code § 13167.5.**

Staffing and Delay

- “[T]hird parties allow a regional board to leverage limited regulatory staff by acting as intermediaries . . . freeing regional water board resources to focus on problem areas or actors.” **Revised Second Draft Order at 20.**
- The Regional Board should not issue permits it lacks the staff to enforce, and the State Board should not approve this approach to regulating the agricultural industry statewide.
- Directing the Central Valley Regional Water Board to convene experts within eighteen months of the adoption of the State Board’s proposed order fails to acknowledge the severity of this issue and the urgency with which the Regional and State Boards should treat the degradation California’s drinking water. **Revised Second Draft Order at 58.**

Substantive Due Process

The government “cannot infringe certain ‘fundamental’ liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.” ***Reno v. Flores*, 507 U.S. 292, 302 (1993).**

California Constitution, Article I, section 1: “All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.”

United States Constitution

- **Amend. V:** “nor shall any person . . . be deprived of life, liberty, or property, without due process of law”
- **Amend. XIV:** “nor shall any state deprive any person of life, liberty, or property, without due process of law”

Deficiencies in the Revised Second Draft Order:

- Clean water is necessary to protect fundamental liberty interests such as life, bodily integrity, and happiness.
- Given its lack of any enforceable standards and anonymous third-party reporting system, the current Order does not protect water quality. Poor water quality will damage people’s health, livelihoods, and property.
 - The expert review process to evaluate the monitoring framework is not sufficient to address these concerns.

Revised Second Draft Order at 58.

- The Order mentions concerns about “costs” to growers, **Revised Second Draft Order at 3, 12**, but cost is not a compelling state interest that can outweigh violations to fundamental liberty rights, ***Shapiro v. Thompson*, 394 U.S. 618, 633 (1969).**

Public Trust

California “holds all of its navigable waterways and the lands lying beneath them as trustee of a public trust for the benefit of the people” and future generations. ***Colberg, Inc. v. State ex rel. Dep’t of Public Works*, 67 Cal. 2d 408, 416-17 (1967) (citation omitted); Nat’l Audubon Soc’y v. Superior Court**, 33 Cal. 3d 419, 437 (1983).

The public trust doctrine is “an affirmation of the *duty* of the state to protect the people’s common heritage of streams, lakes, marshlands and tidelands, surrendering the right of protection only in rare cases when the abandonment of that right is consistent with the public trust.” ***Nat’l Audubon Society*, 33 Cal. 3d at 440 (emphasis added).**

Deficiencies in the Revised Second Draft Order:

- The Order never addresses the public trust doctrine. **Footnote 17, Revised Second Draft Order at 9.**
 - The State Board does not discuss public trust values being sacrificed, potential measures to avoid harm, or the feasibility of those measures.
- The Order allows water pollution by not including enforceable standards or adequate monitoring, and thus does not fulfill its duty to protect the public trust.
 - The expert review process to evaluate the monitoring framework is not sufficient to address these concerns. **Revised Second Draft Order at 58.**
- The State Board abdicates its public trust duty by using third party regulators. **Revised Second Draft Order at 3.**

Reasonable Use

California Constitution, Article X, section 2:

- Water resources “must be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented.”
- “The conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare.”

Water Code § 106: State Board must prioritize domestic use of water resources over irrigated agriculture

Deficiencies in the Revised Second Draft Order:

- The Order does not analyze whether there is compliance with the reasonable use doctrine.
Footnote 17, Revised Second Draft Order at 9.
- The State Board does not ensure that this Order does not result in waste, the unreasonable use of water, or the unreasonable method of use of water.

Human Right to Water

Water Code 106.3: It is the “established policy of the state that every human being has the right to safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes” and “all relevant state agencies, including . . . the state board . . . shall consider this state policy when revising, adopting, or establishing policies, regulations, and grant criteria when those policies, regulations, and criteria are pertinent to the uses of water described in this section”

Health & Safety Code § 116270(a): “Every resident of California has a right to pure and safe drinking water.”

State Board Resolution No. 2016-0010 and **Central Valley Regional Water Quality Control Board Resolution R5-2016-0018** recognize the human right to water as a core value.

Deficiencies in Second Revised Draft Order:

- The Order allows water pollution in the Central Valley by not including enforceable standards for nitrogen or pesticide application and by using third parties to collect and anonymize data. Agriculture will thus continue to pollute drinking water sources in the Central Valley, including surface water and groundwater. By not preventing this pollution, the Order violates the public’s right to pure and safe drinking water.
 - The expert panel on monitoring is not sufficient to address this concern. Even if this panel would make meaningful changes, it is only required to meet in the next 18 months, which is too long to delay addressing this urgent issue. **Revised Second Draft Order at 58.**

Non-Delegation, Non-Abdication, & Right to Information

Right to Information

- **CA Const. Art. I, section 3:** “People have the right of access to information concerning the conduct of the people’s business”
- **Nonpoint Source Policy:** “A [nonpoint source] control implementation program shall include sufficient feedback mechanisms so that . . . the public can determine whether the program is achieving its stated purpose(s).”
- “The public is entitled to know whether the Regional Board is doing enough to enforce the law and protect the public’s water supplies.” ***Zamora v. Central Coast RWQCB, San Luis Obispo Sup. Ct. No. 15CV-0247, Oct. 28, 2016.***

Non-Delegation and Non-Abdication

- Legislatures and regulatory bodies cannot delegate legislative and discretionary powers to private groups in the absence of statutory authority. ***The First National Bank of Orland v. E.S. Ball, 90 Cal.App. 709 (1928).***
- “[B]y involving members of the regulated industry the agency runs the risks associated with the fox guarding the henhouse.” ***Light v. State Water Resources Control Board, 226 Cal.App.4th 1463, 1490 (2014).***
- “[T]he government may not contract away its right to exercise the police power in the future.” ***Avco Community Developers, Inc. v. South Coast Regional Commission, 17 Cal.3d 785, 800 (1976).***

Deficiencies in the Revised Second Draft Order:

- “Private economic” and “general concerns regarding privacy” undefined. **Revised Second Draft Order, Change Sheet #1, 20.**
- The Order allows third-party coalitions to collect and hold onto data, which violates the public’s right to information and the non-delegation and non-abdication doctrines.
- The Order allows the anonymization of data.

Basin Plan(s)

The Porter-Cologne Act requires WDR's to comply with basin plans. **WC §§ 13263, 13269**. The Revised Second Draft order does not abandon the “iterative” management practices that will fail to comply with the Act.

Deficiencies in the Revised Second Draft Order:

- No meaningful standards to measure compliance with the Basin Plan's water quality objectives.
- A 10-year grace period given to growers to correct exceedances if they operate under an SQMP or GQMP. Revised Second Draft Order, Change Sheet #1 at 16. This is not only an excessive period of time in which water pollution will continue under state sanction, but the Order's surface water monitoring program does not provide a means to determine who responsible parties are, let alone whether they are complying with the law.
- The anonymization of member ID's, and aggregation process in general, will lead to an unaccountable regulatory regime. This is particularly problematic given the precedential nature of the Order, as Third Party's throughout the state can easily limit the ability of the regional boards to identify non-compliant growers and enforce Basin Plan water quality objectives.

Nonpoint Source Policy

Elements 1 and 2: Compliance with water quality objectives, beneficial uses, antidegradation requirements and an effective implementation program.

- The monitoring system established by the Order will not effectively detect violations of water quality standards or evaluate management measures.
- No feedback mechanism for management measures; over-reliance on Third Party reporting and aggregating (Revised Second Draft Order at 19).

Element 3: Requires “a specific time schedule, and corresponding quantifiable milestones” to meet NPS program requirements.

- Like with Basin Plan compliance, the 10-year period for growers to come into compliance with the NPS, is too long. It starts the clock after an exceedance is detected, rather than what the law requires: when the NPS program begins.
- Aggregation and anonymization of grower data can prevent individual grower responsibility from ever being assigned, further frustrating Element 3.

Element 4: Requires sufficient “feedback mechanisms” to ensure the program is achieving its stated purposes.

- Lacks verification measures; aggregation and anonymization are problems here too.
- Regional monitoring is inadequate with respect to correlating dischargers’ use of management practices to their impact on more localized waters.

Element 5: Clarity with respect to potential consequences for failure to achieve an NPS program’s stated objectives.

- The ESJ Agricultural General WDRs Information Sheet does not sufficiently address the consequences for failure

Anti-degradation Policy

The Anti-degradation policy requires activities that may produce discharge into existing high-quality water must, in part, not degrade those waters beyond baseline water quality unless:

- A finding that the change in quality is consistent with the maximum benefit to the people of California is made
- Any waste-generating activity must undergo best practicable treatment or control (BPTC)

Deficiencies in the Revised Second Draft Order:

- Order does not summarize the impacts of discharge, thereby failing to demonstrate maximum benefit to the people of California or compliance with BPTC
- Vague, inadequately defined enforcement mechanisms including the concession that “Management plans will evolve over time.” **Revised Second Draft Order at 81.** Such unknown plans cannot constitute BPTC
- Open-ended, unenforceable standards
 - Aggregation and anonymization of data by the coalitions makes quantification and thus mitigation of pollution exceedingly difficult
 - Surfeit of quantifiable timelines for compliance with water quality objectives
 - Will result in upwards of a decade of high-quality water degradation

Public Nuisance

CA Civil Code § 3479: A nuisance is, “[a]nything which . . . unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin . . .” § 3480 defines a public nuisance as, a nuisance which, in relevant part, “affects at the same time an entire community or neighborhood, or any considerable number of persons.”

The Porter-Cologne Act, § 13050(m) defines a nuisance in similar terms but adds that under the Act the nuisance must occur, “during, or as a result of, the treatment or disposal of wastes.”

It is settled law that water pollution constitutes a public nuisance:

- “There is no doubt that pollution of water constitutes a nuisance and in a proper case will be enjoined.” **Carter v. Chotiner, 210 Cal. 288, 291 (1930).**
- “Pollution of water constitutes a public nuisance. In fact, water pollution occurring as a result of treatment or discharge of wastes in violation of Water Code section 13000, et seq. is a public nuisance per se.” **Newhall Land and Farming Co. v. Superior Court, 19 Cal. App 4th 334, 341 (1993).**

Deficiencies in the Revised Second Draft Order:

- Failure to effectively reduce agricultural water pollution constitutes a public nuisance. **See U.S. v. Montrose, 788 F. Supp. 1485, 1495 (C.D. CA 1992)** (finding the state has a “mandatory duty to abate,” under Porter-Cologne, public nuisances caused by water pollution).
- Neither the Revised Second Draft order nor the redlines in Change Sheet #1 have remedied the deficiencies of previous iterations of the order insofar as they do not establish enforceable limitations on agricultural water pollution or timelines for monitoring and compliance programs. As a result, the on-going public nuisance in the Central Valley of water pollution from agricultural runoff, will not be abated.

Anti-Discrimination

Government Code § 11135 prohibits the government from denying “full and equal access to the benefits of, or be unlawfully subjected to discrimination under” any state “program or activity.”

Discrimination against majority-Latino communities

- Disproportionately impacted by nitrate contamination of groundwater
 - More likely to have higher nitrate levels in their drinking water than the population at large
 - Impacts on Latino and low-income communities are made worse because they are more likely to have inadequate healthcare, water treatment, and alternative water sources

Fair Housing issues

- The disproportionate impacts of nitrate contamination violate the rights of low-income residents to the “enjoyment of their residence, landownership, or tenancy” in contravention of **Gov. Code § 12900 et seq.**
- **Government Code § 65008** renders government actions “null and void” that deny individuals this “enjoyment” because they are low income

Deficiencies in the Revised Second Draft Order:

- Does not resolve these concerns. Pg. 63 of the Order contends changes, such as those to drinking water well monitoring provisions, notification requirements to users in case of public health standard exceedances, and AR data reporting, are sufficient.
- Without enforceable limits on water pollution, the order cannot effectively protect minority and low income communities from the unlawfully discriminatory impacts of nitrate contamination. It therefore violates **§ 11135 and § 12900 et seq.**, and is “null and void” under **§ 65008**.

Thank you for your
time and
consideration